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In the Supreme Court of the United States

OCTOBER TERM, 1991

THE HAVASUPAI TRIBE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Havasupai Indian Tribe has the right to block development of a uranium mine on its former aboriginal lands in the Kaibab National Forest near the Grand Canyon.

2. Whether the district court erred in limiting judicial review of the plan of operations for the Canyon mine site to the administrative record of the Forest Service's decision to approve development of the mine.

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OPINIONS BELOW

The opinion of the court of appeals, Pet. App. a-3 to a-13, is reported at 943 F.2d 32. The opinion of the district court, Pet. App. a-14 to a-143, is reported at 752 F. Supp. 1471.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1991. A petition for rehearing was denied on October 9, 1991. Pet. App. a-1 to a-2. The petition for a writ of certiorari was filed on January 7, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves an attempt by petitioners, the Havasupai Tribe and individual members of that Tribe (the Havasupai or the Tribe), to prevent respondent Energy Fuels Nuclear, Inc. (EFN) from mining uranium on mining claims controlled by EFN in Kaibab National Forest near the Grand Canyon. Pet. App. a-14. The Havasupai assert that they have the right to control conduct and restrict activities on this National Forest land.

1. The proposed mine is located in an area regarded as sacred by the Tribe. In the late nineteenth century, the federal government removed the Havasupai from their extensive aboriginal lands around the Grand Canyon and placed them on a reservation about 35 miles away. The government later set apart some of these aboriginal areas as national parks and national forests, including the Kaibab National Forest, which is administered by the Forest Service in the Department of Agriculture. Pet. App. a-26 to a-27.

In 1946, Congress created the Indian Claims Commission to determine Indian claims against the federal government accruing as of that date. See Indian Claims Commission Act of 1946, 25 U.S.C. 70 *et seq.* (1976). In the 1960's, the Havasupai contended before the Commission that the Tribe had been wrongfully deprived of some of their aboriginal lands, including the area containing the proposed mine site at issue here. Pet. App. a-38 to a-40. In 1969, the Indian Claims Commission determined that the United States "had extinguished the [Tribe's] title to [its] lands" outside the Havasupai Reservation, see *Havasupai Tribe* v. *United States*, 21 Ind. Cl. Comm. 324 (1969). It awarded the Havasupai compensation for the taking of their lands in accordance with the

terms of a stipulated agreement between the Tribe and the United States. Congress thereafter authorized and appropriated the payment of the compensation awarded by the Commission. Pet. App. a-40; see Act of Dec. 26, 1969, Pub. L. No. 91-166, 83 Stat. 447; Act of Sept. 29, 1972, Pub. L. No. 92-438, 86 Stat. 741.

2. In October 1984, pursuant to Forest Service regulations, EFN submitted to the Forest Service a plan of operations to mine uranium on its unpatented mining claims in the Kaibab National Forest. Pet. App. a-17 to a-18. After EFN submitted a plan of operations for the mine, the Forest Service sent letters describing the proposed mine and requesting comments to more than 1,700 persons and organizations, including the Tribe. *Id.* at a-94 to a-95. The Forest Service received more than 200 responses, including a letter from the Tribe that referred to "sacred" springs fed by the aquifer underlying the area. However, the letter did not state that the mine site had any other religious significance.

Based on these responses, the Forest Service decided to prepare an environmental impact statement (EIS). Pet. App. a-20; *id.* at a-99 to a-100. The Forest Service elicited suggestions on the scope of the EIS from more than 2,000 federal, state, and local agencies, news media and other interested persons, including the Havasupai, and held a formal meeting in Flagstaff, Arizona. *Id.* at a-20 to a-21; *id.* at a-99. The Havasupai did not submit any additional comments on the scope of the EIS. *Id.* at a-99 to a-100.

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[1] In March 1985, representatives of EFN met for two days with the Havasupai Tribal Council, and described the company's mining proposal in detail. During the meeting, the Tribe's representatives said nothing about any religious significance of the site. While the EIS was being prepared, the Forest Service retained experts to conduct a study of the cultural and religious values of the site. The Tribe never

Three months after the Forest Service issued the draft EIS, the Tribe informed the Forest Service that the area around the mine site was sacred to the Tribe. Pet. App. a-103 to a-104. The Havasupai declined, however, to identify specific religious sites that might be affected so that the Forest Service could fully evaluate the effects of the mine in the final EIS. *Id.* at a-120. The Forest Service arranged to meet with the Tribe's representatives at the mine to identify specific sites, but the Tribe cancelled the meeting and thereafter failed to agree to a site visit. *Id.* at a-108 to a-109. Likewise, the Tribe's comments on the draft EIS said nothing about the religious significance of the mine site. *Id.* at a-110. Nonetheless, preparation of the final EIS included an extensive inquiry into the potential effects of the Canyon Mine on the Tribe's sacred lands, and these concerns were discussed in the final document. *Id.* at a-93.[2]

3. In September 1986, the final EIS was published and the Forest Supervisor issued a Record of Decision approving EFN's modified plan of operations on September 26, 1986. Pet. App. a-21. The Tribe appealed the decision to the Regional Forester and the Chief of the Forest Service, submitting extensive documentation to support their position that they were entitled to block development of the mine. *Id.*

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objected to the investigation of the area on religious grounds; nor did it identify issues of concern to it. Pet. App. a-95 to a-101.

[2] In addition to reviewing numerous scholarly publications about the Tribe, the Forest Service consulted with an anthropologist who had studied the Havasupai extensively and who had testified as an expert on behalf of the Tribe before the Indian Claims Commission in the Tribe's successful suit for compensation for the aboriginal lands. Pet. App. a-106 to a-110; *id.* at a-112.

at a-21 to a-23; see also Resp. EFN Br. in Opp. 10-13. On June 9, 1988, the Chief of the Forest Service approved a modified plan of operations for the Canyon Mine. Pet. App. a-21 to a-22. The Secretary of Agriculture determined that he would not review the Chief's decision on the merits. Accordingly, the Chief's decision became the agency's final determination. *Id.* at a-22 to a-23.

4. In June 1988, petitioners filed suit in the United States District Court for the District of Arizona against the United States, the Department of Agriculture, the Forest Service, the Secretary of Agriculture, and subordinate officials of the Forest Service, challenging the Forest Service's decision approving the modified plan of operations for the Canyon Mine. Pet. App. a-14 to a-15; *id.* at a-22 to a-23.

The complaint asserted that (1) the approval of the mining plan violated the Havasupais' First Amendment rights freely to exercise their religion; (2) the mining operations would deprive them of their aboriginal right of access to the mine site, which they claimed was guaranteed under the Grand Canyon National Park Enlargement Act (the Enlargement Act), 16 U.S.C. 228a *et seq.*; (3) the Forest Service breached its fiduciary duty to the Tribe; and (4) the EIS for the mine failed to comply with the National Environmental Policy Act (NEPA), 42 U.S.C. 4321 *et seq.* Pet. App. a-15 to a-16.

Respondents filed a motion in the district court to limit review to the 5,288-page administrative record. The district court granted the motion, Pet. App. a-16 & n.1, but permitted the Havasupai to conduct discovery upon a showing of "adequate justification regarding the particular discovery request." See Order of July 28, 1988, at 6. The Tribe subsequently filed mo-

tions to Produce the Administrative Record and to Take Discovery, arguing that the record submitted to the district court was not the complete administrative record. On September 8, 1988, the district court denied petitioners' motions. Pet. App. a-16 & n.1.

5. On April 18, 1990, the district court affirmed the agency's decision approving EFN's modified plan of operations for the Canyon Mine. Pet. App. a-14 to a-143. The court found, *inter alia*, that the Havasupais' aboriginal title had been extinguished prior to the 1975 enactment of the Enlargement Act. The court noted that several courts have determined that the reservation of lands for national forest purposes effectively extinguishes Indian aboriginal title. See *United States* v. *Gemmill*, 535 F.2d 1145 (9th Cir.), cert. denied, 429 U.S. 982 (1976). Relying, *inter alia*, on *United States* v. *Dann*, 873 F.2d 1189 (9th Cir.), cert. denied, 493 U.S. 890 (1989), the court also found that the Havasupais' assertion of aboriginal title was barred by the Indian Claims Commission's award of compensation to the Tribe in 1969 and Congress's payment of that award, as well as by principles of res judicata.[3]

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[3] In finding that the Tribe was barred by the prior Claims Commission decision from asserting its rights of access, the court also relied on the fact that, at the time compensation was awarded, the Tribe "expressly stipulated that [it] would be barred from asserting any claim with respect to [its] aboriginal land." Pet. App. a-41 to a-42.

The court further noted that "Section 70u(a) of the Indian Claims Commission Act[,] [25 U.S.C. 70u(a) (1976),] is a statutory bar which provides that '[t]he payment of any claim, after its determination in accordance with this chapter, shall be a full discharge of the United States of all claims and demands touching any of the matters involved in the controversy.' " Pet. App. a-40. The court found that the Tribe's claim of a right of access to the uranium mine site " 'touches'

The court determined that the Enlargement Act did not preserve any affirmative right of access by the Tribe to the mine site, since that right had previously been extinguished. It also held that the Act did not create or confirm any Tribal right to control activities on any non-trust land outside the Reservation, nor did it define a trust responsibility on the part of the United States with respect to the areas at issue. Pet. App. a-51 to a-52, a-72.[4]

6. Petitioners appealed to the Ninth Circuit. They challenged the district court's order restricting its review to the administrative record and contended that the EIS was inadequate, particularly with respect to the evaluation of the effects of mining on groundwater. Petitioners also argued that the Enlargement Act authorized the Tribe to prevent mining at the Canyon Mine site. Pet. App. a-8.

The Ninth Circuit, in a *per curiam* opinion, affirmed. Pet. App. a-3 to a-13. It upheld the district court's decision to deny petitioners' discovery request and limit review to the administrative record filed by the Forest Service. The court noted that the Tribe's claim that the agency considered evidence outside the

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a matter involved in the prior case before the Indian Claims Commission because the Canyon Mine site is within the area of land that was in controversy during those proceedings." As a result, the court concluded, the Tribe "cannot avoid the statutory bar." *Id.* at a-40 to a-41.

[4] The district court also held that the Forest Service's EIS was adequate under NEPA, Pet. App. a-74 to a-142, rejected the contention that the Forest Service's approval of the mining plan of operations violated the government's fiduciary duty to the Tribe, *id.* at a-61 to a-73, and ruled that approval of the mining plan did not violate the Tribe's First Amendment right to the free exercise of religion. *Id.* at a-54 to a-61. Petitioners do not challenge any of these rulings here.

record was "purely speculative" and that petitioners had failed to demonstrate that "the Chief of the Forest Service acted in bad faith or relied on materials outside the administrative record." *Id.* at a-8 to a-9.

The court also rejected the Tribe's claim, in reliance on the Enlargement Act, of a "right of access, essentially amounting to an easement, to the area that includes the mine site." Pet. App. a-11. It agreed with the district court's conclusion that the Tribe's aboriginal title was extinguished prior to enactment of the Enlargement Act, when the Indian Claims Commission ordered Congress to pay—and Congress did pay—compensation to the Havasupai. Therefore, the court explained, aboriginal title was not extinguished by the Enlargement Act, and Section 228i of the Act did not operate as a "condition upon the Tribe's relinquishment," under which the Tribe retained "an easement to any religious site included within the land it gave up." Pet. App. a-11 to a-12.

ARGUMENT

The court of appeals' decision is correct, is consistent with the decisions of this Court and other courts of appeals, and presents no issue that warrants this Court's review.

1. The court of appeals correctly rejected petitioners' claim that Section 228i(c) of the Enlargement Act, 16 U.S.C. 228i(c),[5] grants the Tribe the right to

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[5] This provision provides, in pertinent part:

> Nothing in sections 228a to 228j of this title shall be construed to prohibit access by any members of the [Havasupai] tribe to any sacred or religious places or burial grounds, native foods, paints, materials, and medicines located on public lands not otherwise covered in sections 228a to 228j of this title.

prevent development of a uranium mine on EFN's claims. Before this Court, petitioners essentially repeat their argument before the courts below that "the first and only act of Congress extinguishing Havasupai aboriginal title was the [Enlargement Act]," Pet. App. a-43, a-11, and that the Tribe retained aboriginal title in the lands until the Act was passed in 1975. Petitioners thus maintain that in extinguishing title, the Enlargement Act placed a "condition upon the Tribe's relinquishment" under which the Tribe retained "an easement to any religious site included within the land it gave up." Pet. 16-17; see Pet. App. a-11 to a-12.

Petitioners' argument fails. Aboriginal or Indian title, as a permissive right of occupancy, may be extinguished at any time "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise." *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 347 (1941). Executive action is sufficient to extinguish Indian title as long as it is not "wholly unauthorized by Congress," or as long as Congress "acquiesce[s]" in the action of the Executive Branch. *United States* v. *Dann*, 706 F.2d 919, 928-929 (9th Cir. 1983), rev'd in part on other grounds, 470 U.S. 39 (1984).

As the court of appeals held, the Tribe's aboriginal rights were completely extinguished well before Congress enacted the Enlargement Act. First, the federal government forcibly removed the Havasupai from their aboriginal land and confined them to a reservation. Second, the government incorporated the former Havasupai lands into national forests. Third, the Indian Claims Commission awarded the Havasupai compensation for the aboriginal lands taken by

the government, and Congress authorized payment of the compensation.[6]

The Tribe's assertion (Pet. 13) that the Claims Commission lacked authority to extinguish aboriginal title misses the mark. The Commission was authorized to determine whether Indian title was extinguished by prior events and governmental actions. *Dann*, 706 F.2d at 922. Indeed, the Claims Commission generally has awarded compensation for aboriginal lands only because Indian title had previously been extinguished. See R. Strickland, *F. Cohen's Handbook of Federal Indian Law* 492 (1982). Moreover, Congress's express authorization of payment on the Commission's judgment evinces its acquiescence

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[6] The Ninth Circuit, in *United States* v. *Gemmill*, 535 F.2d 1145, cert. denied, 429 U.S. 982 (1976), determined that the Pit River Indian Tribe's aboriginal title was extinguished on virtually identical facts. The *Gemmill* court found that the federal government had forcibly removed the Indians from their aboriginal lands. 535 F.2d at 1148. This action was by itself "a strong indication of the sovereign's intent to revoke the [Indians'] rights of permissive occupancy." *Ibid.* Also, the government incorporated the Indians' former land into forest reserves and national forests. This action, "after the Indians had been forcibly expelled, leaves little doubt that Indian title was extinguished." *Id.* at 1149. Accord *United States* v. *Pueblo of San Ildefonso*, 513 F.2d 1383, 1391-1392 (Ct. Cl. 1975); *Confederated Salish and Kootenai Tribes* v. *United States*, 401 F.2d 785, 789 (Ct. Cl.), cert. denied, 393 U.S. 1055 (1969). Finally, Congress compensated the Indians for their aboriginal land after the Indian Claims Commission ruled that the government had taken their land without compensation. Payment of the claim clearly demonstrated that "Congress had revoked the Indians' rights of permissive occupancy." *Gemmill*, 535 F.2d at 1149. See also *United States* v. *Pend Oreille Public Utility Dist. No. 1*, 926 F.2d 1502, 1508 (9th Cir.), cert. denied, 112 S. Ct. 415 (1991).

in the Commission's determination in 1969 that the Tribe no longer possessed aboriginal title to the land.

Because the Tribe's aboriginal rights had already been completely extinguished, the Enlargement Act could not have effected a conditional extinguishment of aboriginal rights, nor could it have "preserved" any aboriginal rights to the Tribe.[7] The Enlargement Act also cannot be construed to have reestablished aboriginal title that had previously been extinguished. The Act enlarged the Havasupai Reservation by placing about 185,000 acres in trust for the Tribe. See Pet. App. a-48 to a-49. It designated additional areas for the Tribe's use for specified purposes. 16 U.S.C. 228i(e). The "access" provision in Section 10(c) of the Act, 16 U.S.C. 228i(c), upon which petitioners chiefly rely, states that nothing in the Enlargement Act itself prohibits access to land not otherwise covered by the Act, including the mining site at issue here. That language on its face does not grant the petitioners an affirmative property right or easement, nor does it confer authority to control access or use by others. Rather, Section 228i(c) simply insures

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[7] Petitioners contend that the district court's conclusion that their aboriginal rights had been extinguished prior to the Enlargement Act is implausible because that statute contains an extinguishment provision that would have been unnecessary if the Tribe's rights had previously been extinguished. Pet. 10 (citing 16 U.S.C. 228i(f)). As the district court found (Pet. App. a-45 to a-47), the legislative history of the Enlargement Act suggests that Congress was uncertain about the status of the Havasupai's title to its aboriginal lands. Although "whether or not aboriginal title of the Havasupai had previously been extinguished" was irrelevant to the legislative purpose of the Act, see Pet. App. a-45, Congress appears to have decided to include language affirming the extinguishment of petitioners' aborginal title in order to put the matter to rest.

that the Act will not be construed to *limit* preexisting rights of access to areas not covered by the Act.[8]

Under petitioners' construction, the Enlargement Act would, in effect, grant the Tribe the authority to veto activities on vast tracts of non-trust lands, encompassing millions of acres, to which the Tribe formerly had aboriginal title. There is no indication in the language or legislative history of the Act that Congress intended to accomplish that sweeping result. As the court of appeals pointed out, Pet. App. a-51, the contention that 16 U.S.C. 228i(c) creates an affirmative right of access is refuted by the language of other sections of the Act, which shows that Congress knew how to express its intent explicitly to place land in trust for the benefit of the Tribe and to provide a right of access. See, *e.g.*, 16 U.S.C. 228i(c) ("[T]he Secretary shall have the right of access to any lands hereby included in the Havasupai Reservation."). The court of appeals correctly observed that "[n]o similar grant in trust or affirmative right of access is created by the language [petitioners] cite[]." Pet. App. a-51.

2. The district court properly confined its review of the Forest Service's action to the administrative record. In reviewing final agency action, "[t]he task of the reviewing court is to apply the appropriate APA standard of review, 5 U.S.C. § 706, to the agency decision based on the record the agency pre-

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[8] The Tribe and other petitioners, as members of the public at large, cannot be denied access to EFN's unpatented mining claims unless EFN shows that access will materially interfere with mining operations. See *United States* v. *Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1286 (9th Cir. 1980). Although the Enlargement Act preserves the Tribe's right of access to the site if consistent with mining activities on the claim, it does not confer the authority to block those activities.

sents to the reviewing court." *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 743-744 (1985). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). If the administrative record does not adequately support the decision, then "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Lorion*, 470 U.S. at 744. The Court should not ordinarily permit probing of the administrator's mental processes beyond what appears in the administrative record. See *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 420 (1971); *United States* v. *Morgan*, 313 U.S. 409, 422 (1941); *Coalition on Sensible Transp., Inc.* v. *Dole*, 826 F.2d 60, 72 (D.C. Cir. 1987); *Warren Bank* v. *Camp*, 396 F.2d 52, 56-57 (6th Cir. 1968).

Petitioners assert that, in arriving at its decision, the agency relied on documents that were not included in the administrative record before the court. Petitioners challenge the requirement that they provide evidence of the agency's "bad faith" in relying on matters outside the record before being permitted to engage in discovery of the materials on which the agency allegedly relied.

Petitioners' challenge is foreclosed by this Court's decision in *Citizens to Preserve Overton Park*, 401 U.S. at 420, in which the Court held that where the agency provides a formal explanation of its decision, an inquiry beyond the record will not be permitted absent evidence of agency bad faith.[9] As the court of

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[9] The requirement that the party seeking discovery provide some basis for believing the record is incomplete is necessary in view of "[t]he ease with which charges of 'bad faith' could be leveled, combined with the inordinate burden resolution of

appeals correctly noted, petitioners failed to provide any support for their contention that the agency relied on documents or materials not included in the record. The court of appeals therefore correctly affirmed the district court's decision to deny further discovery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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such claims would entail for courts * * *." *San Luis Obispo Mothers For Peace* v. *NRC*, 751 F.2d 1287, 1327 (D.C. Cir. 1984); see also *Animal Defense Council* v. *Hodel*, 840 F.2d 1432, 1438 (1988), modified, 867 F.2d 1244 (9th Cir. 1989).

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